MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. CUM-15-558

Marie Gunning
Appellant

v.

John Doe,
Appellee

On appeal from the Cumberland County Superior Court

APPELLANT'S REPLY BRIEF

May 13, 2016

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The Does attempt to deflect attention away from the true purpose of the retaliatory publication by portraying Ms. Gunning as a thin-skinned politician, complaining about statements made in the *Crow's Nest.* Contrary to the Does' portrayal, Ms. Gunning and many other victims of the *Crow's Nest* were not politicians. (A. 26-69, 118-22.) The Crow's Nest was not intended, as they indicate, to "parody local politicians, public figures, politics, and events." (Red Br. 2). According to the *Crow's Nest's* own authors, it was intended to retaliate against individuals who made comments that they did not like during the Freeport Town Council's public comment period, even including actual pictures of targeted individuals at the Town Council meetings. (A. 124. ("Everyone who enters the public forum and speaks to public issues is fair game within reason. If you choose to speak on the public record it is your choice to make.”))

In fact, the record shows that during the whole period that the *Crow's Nest* was being published Ms. Gunning was ***not*** a politician and was ***not*** running for public office in Freeport.[1] (A. 118-22). The Does tie together the gravamen of Ms. Gunning's complaint, the "Lindsay Lohan" issue that makes reference to

[1] The Does contend that Ms. Gunning was a candidate for Freeport Town Council in 2012, referring to the fabricated stories they authored in the *Crow's Nest* which included fabricated quotes, fake reports of campaign events and made-up campaign slogans. (Red Br. 4.) Doe's contention is false. Ms. Gunning's short bid for Town Council lasted from September through November 2011. (A. 118.) Then, as now, the *Crow's Nest* authors fabricated stories in an effort to have others dismiss, as politically motivated, issues Ms. Gunning raised as a private citizen.

demonstrably false and defamatory statements about Ms. Gunning, with the so-called "Election Special" issue. (Red Br. 4.) This misleading picture fails to reveal that the defamatory "Lindsay Lohan" edition appeared over a year and a half after her one brief run for office. (A. 118-22.) There was no connection to a recent election and no parody in the article. All of the statements attributed to Ms. Gunning in the article were completely fabricated by the authors.

ARGUMENT

To be clear, the Does and amici urge this Court not to protect the constitutional right to anonymity, but to *create* it. Upon recognizing this right, they ask this Court to construct a test to protect the identity of anonymous speakers. Therefore, the Court must ask: what is the legal authority for this protection? Recognizing a broad right to anonymous speech would be perilous in a number of ways, many of which will be likely unforeseen. However, this Court can protect the identity of anonymous speakers against frivolous "unmasking" litigation by adopting a two-step process. (1) In the first stage, when the defendants are unknown and are not participating, the court may require reasonable notice to alert a Doe defendant of the existence of the action. (2) In the second stage, this Court should follow the majority of jurisdictions and hold that when a Doe defendant has been afforded the opportunity to participate, disclosure of his or her identity is permitted if the Plaintiff makes a limited showing of prima facie

evidence only of those elements within the Plaintiff's direct control. Adopting this moderated test would put Maine squarely within the majority of jurisdictions and would not create too onerous of a burden upon plaintiffs.

I. The California Court's Judgment Was Interlocutory Because Appeal by Extraordinary Writ Was Unavailable

The trial court erred in concluding that the California court's Amended Order on John Doe 1 and John Doe 2's Petition to Quash Subpoena was final and therefore entitled to preclusive effect.[2] The Does argue that the trial court correctly determined that the Order was appealable because she could have filed an extraordinary writ of appeal with the California Court of Appeals, but this is incorrect. There was no review of the discovery order as a matter of right. In order to appeal the Amended Order by the California Court, Ms. Gunning would have been required to demonstrate that she was threatened with "immediate harm, such as loss of a privilege against disclosure, for which there is no other adequate remedy." *Zurich Am. Ins. Co. v. Cal. Super. Ct.*, 66 Cal. Rptr. 3d 833, 837 (Cal. Ct. App. 2007); *see also Kleitman v. Cal. Super. Ct.*, 87 Cal. Rptr. 2d 813, 818 (Cal. Ct. App. 1999) *as modified* (Sept. 9, 1999). The parties agree that Ms. Gunning could not make that showing, and therefore, she could not appeal the Order. It is an unreasonable, illogical, and absurd construction of the res judicata

[2] The parties agree that the standard of review for the res judicata analysis is de novo. (Blue Br. 17-18, Red Br. 12-13.)

analysis to require a party to file an obviously frivolous appeal in order to overcome the finality requirement.

California, like Maine, requires orders on motions to quash subpoenas to terminate the litigation if they are to be appealed. *Dana Point Safe Harbor Collective v. Superior Court*, 243 P.3d 575, 577 (Cal. 2010); *accord. In re Motion to Quash Bar Counsel Subpoena*, 2009 ME 104, ¶ 10, 982 A.2d 330; *see also* California Code of Civ. P. § 904.1 (listing judgments from which appeal is available and prohibiting appeal from interlocutory judgments, except for in certain circumstances inapplicable to this case). The Does do not dispute that the Amended Order Granting John Doe 1 and John Doe 2's Petition to Quash Subpoena did not terminate the litigation between the parties, but rather only foreclosed one avenue for Ms. Gunning to discover the identities of the persons defaming her.

In order to have preclusive effect, a judgment of another court must be final, *Beal v. Allstate Ins. Co.*, 2012 ME 20, ¶ 12, 989 A.2d 733. Maine law provides that a judgment is final if it is appealable. *See Sevigny v. City of Biddeford*, 344 A.2d 34, 38-39 (Me. 1975). Ms. Gunning's review of this interlocutory order was only available through "extraordinary writ." Although the Does argue that *Sevigny* is distinguishable because it involved a preliminary injunction, (Red Br. 20), Ms. Gunning does not rely on *Sevigny* for the purposes of determining whether motions

to quash are final in the manner of preliminary injunctions, but rather she relies on the Court's holding that judgments are considered final for the purposes of res judicata if they are considered final for the purposes of an appeal. *Sevigny*, 344 A.2d at 39.

The crux of the dispute between the parties, however, is whether Ms. Gunning had available to her review by an extraordinary writ. The parties do not seem to dispute that review by extraordinary writ—which is akin to Maine's interlocutory review for cases subject to the collateral order or death knell exception to the final judgment rule—requires the appealing party to demonstrate that he or she is threatened with "immediate harm, such as loss of a privilege against disclosure, for which there is no other adequate remedy" in the absence of an appeal. *Zurich Am. Ins. Co. v. Cal. Super. Ct.*, 66 Cal. Rptr. 3d 833, 837 (Cal. Ct. App. 2007); *see also Kleitman v. Cal. Super. Ct.*, 87 Cal. Rptr. 2d 813, 818 (Cal. Ct. App. 1999) *as modified* (Sept. 9, 1999).

The Does contend that because Ms. Gunning could have filed a writ of discretionary review in extraordinary cases, a so-called extraordinary writ—notwithstanding the fact that it is wholly inapplicable—that the Order is therefore final. (Red Br. 22-25.) Specifically, the Does argue that because the Restatement (Second) of Judgments, comment a to section 28, calls out "extraordinary writ[s]" by name and because Ms. Gunning failed to cite authority that her "odds of success

on appeal" was relevant, Ms. Gunning cannot claim that the Amended Order was final.[3] (Red Br. 22.) This is an extraordinarily strained reading of the res judicata analysis, including the Restatement. Comment a to Section 28 provides, in relevant part, "when the determination of an issue is plainly essential to the judgment but the party who lost on that issue is, for some other reason, disabled as a matter of law from obtaining review by appeal *or, where appeal does not lie by* injunction, *extraordinary writ,* or statutory review procedure" the order is not given preclusive effect. Restatement (Second) of Judgments § 28 cmt. a.

Appeal of the California Order by extraordinary writ "did not lie" because Ms. Gunning was not threatened with "immediate harm, such as loss of a privilege against disclosure, for which there is no other adequate remedy" in the absence of an appeal. *Zurich Am. Ins. Co*, 66 Cal. Rptr. 3d at 837. An appeal by an extraordinary writ "lies" when a party may avail himself or herself to it. To hold, as the Does would urge, that the Order ought to be given preclusive effect would produce illogical results and would encourage unnecessary and specious litigation and could open her counsel to Rule 11 sanctions. Ms. Gunning is not required, under the principles of res judicata, to file an appeal that she knows is frivolous and this Court should not read the comment to the Restatement so restrictively. As

[3] The Does also confuse review by extraordinary writ in state-court appeals with a common law writ of mandamus. (Red. Br. 23.)

the Restatement provides: "The fact that a trial court order may be reviewable by interlocutory appeal, for example under 28 U.S.C. § 1292(b), does not necessarily mean that the matter resolved in the order should be treated as final for purposes of res judicata." Restatement (Second) of Judgments § 13 cmt. b.

The Does argue that the California courts *have* heard appeals from discovery orders on motions to quash a subpoena, citing *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1161 (2008). However, in *Krinsky*, unlike in this case, it was the *defendants* who lost the Motion to Quash and they could, and did, avail themselves of review by extraordinary writ because they *were* threatened with immediate harm: the disclosure of their identities, which would have been irreparable and for which there was no other adequate remedy. *Krinsky*, 159 Cal. App. 4th at 1160-61. This supports Ms. Gunning's position that review by extraordinary writ is only available if she could have demonstrated some immediate, irreparable harm. *Zurich Am. Ins. Co*, 66 Cal. Rptr. 3d at 837.

Precisely because the direct appeal was not available as a final judgment, pursuant to California Code of Civil Procedure § 904.1, and because interlocutory review was unavailable where Ms. Gunning's case did not meet the criteria for obtaining an extraordinary writ, the California Order is interlocutory and nonfinal for the purposes of res judicata.

II. Maine Law, Not California Law, Governs the Res Judicata Analysis

Additionally, the Does misconstrue the applicable law governing the res judicata analysis. This point is critical because Maine law, unlike California law, states that a judgment is not final for the purposes of res judicata if it is not final for the purposes of an appeal.[4] *See Sevigny*, 344 A.2d at 38-39. Pursuant to California law, in contrast, whether the Order is appealable is just one of many factors that the court considers in determining finality. *See George Arakelian Farms, Inc. v. Agric. Labor Relations Bd.*, 783 P.2d 749, 756 (Cal. 1989) ("[F]inality for purposes of appellate review is not the same as finality for purposes of res judicata."). Although this Court looks to California law to determine whether the order is appealable under California procedure, it does not—as the Does urge—lift the entirety of California res judicata law to apply here in Maine. *See, e.g.*, *Van Houten v. Harco Const., Inc.*, 655 A.2d 331, 333-34 (Me. 1995) (applying Maine law to determine whether a claim or issue was precluded by a Massachusetts judgment); *see also Hossler v. Barry*, 403 A.2d 762, 768-69 (Me. 1979).

The Does argue that because "persons bound by and issues determined by valid and final judgments is determined by the local law of the state where the

[4] Finality for the purposes of res judicata, consistent with the Restatement approach, generally tracks finality for appellate review. *See* Restatement (Second) of Judgments § 13 cmt. b ("A general working description of finality in the field of former adjudication will, however, resemble the older, traditional, strict formulation of the concept of finality for appellate review."). However, the fact that a matter may be subject to interlocutory review does not render it "final" for the purposes of res judicata. *Id.*

judgment was rendered," that this Court must apply California law to determine whether the issues are precluded as a matter of res judicata. (Red. Br. 14 (quoting Restatement (Second) of Conflict of Laws §§ 94-95)).

Neither the Restatement nor this Court have ever taken the approach that, in determining whether a judgment is preclusive for collateral estoppel purposes, the state considering the res judicata claim (the second state) applies the law of the state where the first order was entered wholesale. *See* Restatement (Second) of Conflict of Laws § 94. Rather, the Restatement and Maine case law take a more nuanced approach.

> None of these decisions, however, compels the conclusion that full faith and credit incorporates every minute detail of res judicata doctrine. . . . The essential point is that some aspects of modern preclusion doctrine should fall outside full faith and credit both because they are incidental to the central role of res judicata and because they may intrude on substantial interests of later courts.

Miller & Wright, 18B Fed. Prac. & Proc. Juris. § 4467 (2d ed., Apr. 2016).

For example, in *Van Houten v. Harco Construction, Inc.*, this Court addressed a prior decision by a Massachusetts administrative court concluding that an employee had suffered a work-related back injury. 655 A.2d at 332. This Court concluded that the administrative court's prior order barred the Maine Worker's Compensation Board from concluding that the injury was not work-related. *Id.* at 333-34. In doing so, applied and cited Maine case law for the scope and purpose of res judicata, including for the proposition that this Court "permits the use of

offensive collateral estoppel 'on a case-by-case basis if it serves the interests of justice.'" *Id.* at 333-34 (quoting *Mutual Fire Ins. v. Richardson,* 640 A.2d 205, 208 (Me. 1994)). Similarly, in *Hossler v. Barry,* this Court recognized that its prior judgments "eschew[ed] any mechanical approach to choice-of-law questions. The more flexible methodology under *Beaulieu* stresses a comparison of the relative contacts of the forum and other interested states to '[give] controlling effect to the law of the state which has the greatest contact or concern with, or interest in, the specific issue creating the choice-of-law problem before the court.'" 403 A.2d 762, 766 (Me. 1979).

Ms. Gunning does not contest that she is bound by the California order. *See* Restatement (Second) of Judgments § 94 ("What persons are *bound* by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered." (Emphasis added)). Clearly she cannot seek from Maine courts the enforcement of a second, separate subpoena against Automattic, Inc., which the California court has already quashed. However, in determining whether the issues decided by the California court in quashing the subpoena ought to be given preclusive effect—Maine applies its own law. Maine has a substantial interest in protecting its own citizens against defamatory statements made in this state. In applying Maine law, this Court should conclude that because the California Order was not appealable and

therefore not final, and the trial court erred in concluding that it precluded an independent judgment by the Maine court.

III. The Appellees Ask This Court to Create Wholly New Cyber-SLAPP Protection

Understanding the scope of the "right" to anonymity is critical in evaluating what measures ought to be taken to protect it. In Maine, as in the United States Supreme Court, free speech does not equate to speech free of consequences. Accountability in speech, as with all other actions, is key to our system of democracy. "Unless individuals and, more importantly, governments can be held accountable, we lose all recourse to the law and hence risk our very freedom . . . the only real solution is more openness, not less." David Davenport, *Anonymity on the Internet: Why the Price Might Be Too High*, 45 Commnc'n of the ACM No. 4, 33-35 (Apr. 2002). Maine has not recognized a legal "right" to anonymous speech.[5]

[5] The Does argue that "When in 2005 the Law Court in *Fitch* left open the possibility of adopting the *Dendrite* standard to protect the 'recognized right to anonymous speech,' only New Jersey and a few other courts had addressed the precise issue," is a substantial and material misrepresentation of this Court's opinion in *Fitch v. Doe*. The full quoted sentence reads:

> Doe and *amici* urge us to adopt heightened standards for use in the trial courts when a plaintiff seeks identifying information about an unknown speaker from an ISP. Other courts have adopted such standards to ensure that court orders do not infringe upon the First Amendment and the recognized right to anonymous speech.

2005 ME 39, ¶ 27, 869 A.2d 722. The Court goes on to state that "Because Doe failed to raise the issue in the trial court, we decline at this time to consider *the extent to which the First Amendment affects the consideration of motions to disclose information about anonymous ISP subscribers*." *Id.* (emphasis added).

Indeed, the recognition of such a "right" could have grave consequences. As Justice Scalia concluded, in explaining that the U.S. Supreme Court has never recognized a "right" to anonymity, "the silliness that follows upon a generalized right to anonymous speech has no end." *McIntyre v. Oh. Elections Comm'n*, 514 U.S. 334, 380-81 (1995) (Scalia, J., dissenting). For example, a doctor, lawyer, or psychologist could anonymously reveal the most intimate and personal secrets of their clients without fear of reprisal where such disclosure where such information is "true." There could be devastating implications for our democratic system if campaign finance regulations—which currently require disclosure of all donors who give amounts over certain limits if anonymity were recognized as a right of free speech. *See* 21-A M.R.S. §§ 1016(3), 1017-A(1) (2015); *see also Nat. Org. for Marriage v. Comm'n on Gov. Ethics & Elec. Practices*, 2015 ME 103, 121 A.3d 792. Additionally, city council meetings could be overrun with purported anonymous interests, who—being protected from disclosing their identities—may not actually have an interest in the issue before the City or Town, but who may be seeking to skew results for their own financial gain. "Criminals, tortfeasors, and trolls use the power of anonymity as a tool to perpetrate their wrongdoing in the same manner a ski mask is used in a bank robbery." Christopher Baione, *Examining Anonymous Internet Speech: Why the Pols Cannot Control the Trolls*,

Law School Student Scholarship, Paper 179 *available at* http://scholarship.shu.edu/student_scholarship/179/ (last visited May 12, 2016).

While these examples are abhorrent, there is a much more ominous and real reason to avoid recognizing anonymity as a right under Maine law that is brought to the fore in this case. As was exactly suspected in this case, with protection for anonymous communication "then [that protection] would be available, not just to the private citizen, but to the state and to those individuals comprising it." Davenport, *supra* at 34.

> Highly sensitive material could be leaked, paybacks could be made to secure lucrative deals, pressure could be placed on officials, elections could be rigged, and arrangements could be made for political opponents to be attacked or even eliminated, all with impunity. *Distrusting a government accountable to the people is one thing, facilitating a government completely unaccountable is quite another*.

Id. Where, as was suspected here, government actors, availing themselves to anonymous speech "rights," engage in a sinister abuse of power. In this case, it is suspected that government actors sought (and succeeded) in intimidating not politicians, but *individuals*, from participating in the Town meetings.

Certainly, anonymity would seem to augment the protection against state control by ensuring that those who engage in certain speech evade punishment or control, but this does not outweigh the social costs of recognizing the "right" to anonymity. To be clear, we are not discussing protections for a pseudonymous author seeking protection from an oppressive state in the tradition of the Federalist

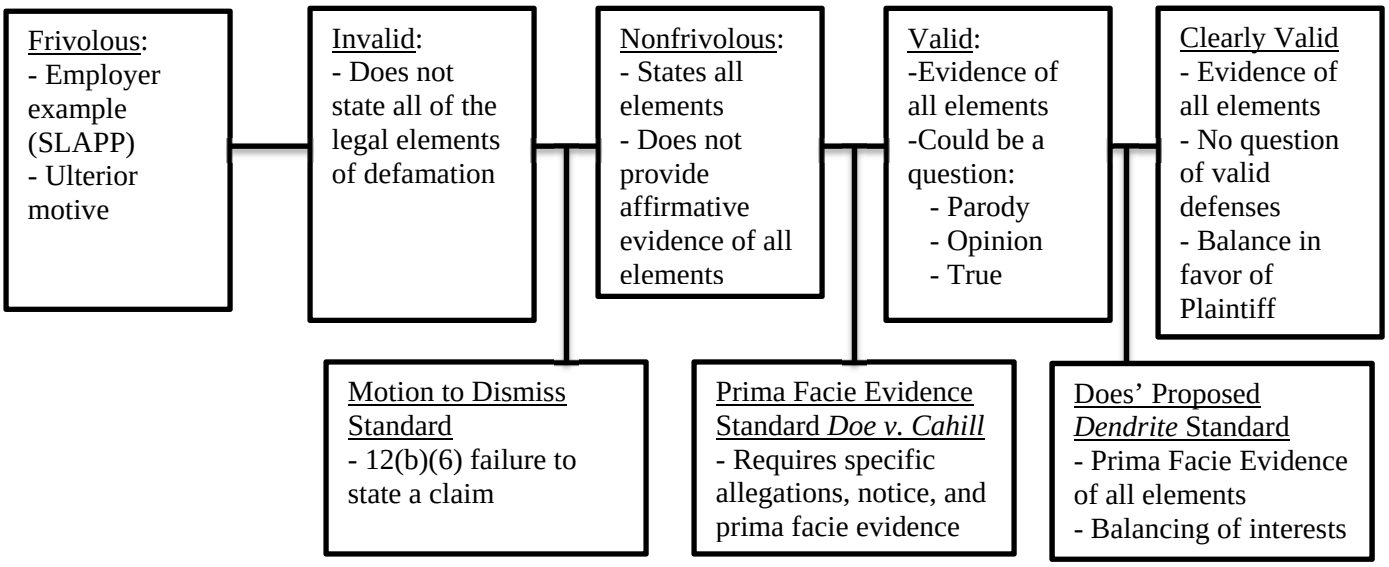
papers (*Cf.* Amicus Br. 15), this test applies only after people have been sued for defamation or other civil or criminal wrongs. "In a free and fair society, justice must exist, and be seen to exist." Davenport, *supra* at 33. Accountability means precisely that: Those who abuse the system to harm other people should be identified and brought to justice.

IV. The Weaknesses of the *Dendrite* Approach

Although there may be some circumstances in which this Court should limit disclosure of an anonymous speaker's identity, understanding the dangers inherent in recognizing a broad right to anonymity is vital in crafting the appropriate balance. The following chart illustrates a range of strengths of defamation cases. On one end of the spectrum are the obviously frivolous cases, such as the case illustrated by the amici curiae in which an employer sought disclosure of an alleged defamer not to seek relief, but to discover the identity of the employee to take disciplinary action. (Amicus Br. 18.) On the other end of the spectrum are those cases for which there is prima facie evidence of each element, no valid defenses, and the balance of the interests weigh in favor of the Plaintiff.

Below the range of cases are the various tests that this Court could employ, based on those used in other jurisdictions. "These unmasking standards . . . have been formulated on a jurisdiction-by-jurisdiction basis, resulting in what has been described as an 'entire spectrum' or, less charitably, a 'morass' of unmasking

standards." Matthew Mazzotta, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. Rev. 833, 846 (2010) (noting that at least ten distinct tests have emerged).



The example given by amici curiae of an employer seeking to unmask a dissenting employee is a red herring. Much like the strategic lawsuits against public participation (SLAPPs), crafting an entire set of judge-made prelitigation rules designed to deter these meritless lawsuits will have unintended consequences. *See Nader v. Me. Dem. Party*, 2012 ME 57, ¶ 45, 41 A.3d 551 (Silver, J., concurring) (discussing the misuse of anti-SLAPP relief). First, as with SLAPPs, it does not appear that Maine has had issues with employers misusing defamation litigation against anonymous speakers, or more appropriately in the digital age, posters. *See id.* Moreover, unlike anti-SLAPP relief, the *Dendrite* test put forward

by the Does and amici would not discern and eliminate this type of case because presumably the employer or company would have a valid defamation action—it is simply not their intention to carry it through to trial when it is filed.

Additionally, although this Court has noted on many occasions that prima facie evidence "is a 'low standard' that does not depend on the reliability or credibility of the evidence, all of which may be considered at some later time in the process," there should be limits on the prima facie evidence required of plaintiffs in anonymous defamation cases. *Cookson v. State*, 2011 ME 53, ¶ 8, 17 A.3d 1208. It makes little sense to require a plaintiff to provide prima facie evidence of each element of a claim when a defamed person has not been identified. For those plaintiffs who may also be public figures, providing prima facie evidence of actual malice by an unnamed and unidentified defendant would be an impossible burden. *Cahill v. Doe*, 884 A.2d 451, 463 (Del. 2005) (holding that public-figure plaintiffs are not required to provide prima facie evidence of actual malice). Similarly, to the extent that the a Doe defendant has been identified (although yet unnamed) and is participating in the case, it makes little sense to require the plaintiff to provide affirmative evidence about specific, fact-laden defenses raised by the Doe defendant, including truth, without first obtaining discovery. To hold otherwise would put the two parties on an uneven playing field. On the one hand, the Court would allow an anonymous party to participate

and raise defenses that may be subject to challenge. On the other hand, it would require defamed persons to provide *affirmative evidence* demonstrating that these allegations are false, without the opportunity to adequately face the party defaming him or her. Thus, the court should permit disclosure of a Doe defendant's identity if the Plaintiff can provide prima facie evidence of all of the elements that are squarely within the plaintiff's control—namely the elements of defamation, absent actual malice for public figure plaintiffs.[6] *See, e.g., id.*; *Krinsky*, 72 Cal. Rptr. 3d at 245; *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009).

Finally, the balancing test that was rejected by courts in *Cahill v. Doe*, should also be rejected by this Court. *See Doe I v. Individuals*, 561 F. Supp. 2d at 254-56; *see also* Mazzotta, *supra* at 855-56 ("[B]alancing prongs are found in the acute minority of cases."). This balancing test, like the converse summary judgment test originally rejected in anti-SLAPP cases in *Nader I*, 2012 ME 57, 41 A.3d 551, sets the bar too high for Plaintiffs. *See Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457-59 (Md. Ct. App. 2009) (Adkins, J., concurring) (noting that the balancing test "would undermine personal accountability and the search for truth, by requiring claimants to essentially prove their case before even knowing who the commentator was"). Application of the balancing test would violate the

[6] Nothing in the Appellant's Briefs or the discussion of public-figure plaintiffs should be interpreted a concession that she herself would be a public figure.

constitutional rights of plaintiffs with valid defamation claims to seek redress from the courts. Me. Const. art. I § 19. Further, to require a "balancing" of interests is both redundant to the prima facie evidence already required, and it complicates the adjudication of a claim which the court has already determined is entitled to relief on the merits. Thus, in considering what showing should be required by plaintiffs in defamation cases involving anonymous speakers, this Court should not be persuaded by inapposite cases involving ill-motivated employers to adopt restrictive and unnecessary elements.

V. Upon What Showing Should this Court Require Disclosure of an Anonymous Speaker?

This Court is tasked with balancing the perceived misuse of the discovery process with the need for Plaintiffs to seek adequate redress from anonymous speakers. In doing so, this Court should adopt a two-step process: (1) with the first step involving Does who are unidentified and have not appeared; and (2) a second step in which the Does are actually present and litigating the case. This is the most logical approach to adopt the aspects of the test that have the broadest consensus. *See* Mazzotta, *supra*, 847-66 (identifying the consensus among the various jurisdictions considering anonymous speech).

In the first step, the Court may require that Plaintiffs undertake reasonable efforts to provide adequate notice to and a reasonable opportunity for the Does to

respond. Concomitantly, the Court should provide the Plaintiffs with sufficient leeway, as the trial court aptly did in this case, in allowing sufficient time to provide a return of service. After reasonable notice is provided, whether the Doe defendant does not respond, or if a Doe defendant responds and begins participating in the case, the court may proceed to the second step.

In the second step, the Court may require a limited evidentiary showing on the aspects of the claim that are solely within the Plaintiff's control, *see Doe I v. Individuals*, 561 F. Supp. 2d 249, 256 (D. Conn. 2008); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 245 (Ct. App. 2008). If the plaintiff provides prima facie evidence of a valid defamation claim—to those elements directly within the plaintiff's control—then the claimed need for anonymity vanishes and the Court should order disclosure of the Doe defendant's identity. This analysis provides a logical basis for the court to assure itself that the identity of an anonymous poster is not being sought improperly, and it does not create undue or overwhelming burdens on the Plaintiff.

VI. The Crow's Nest Is Not Parody

Finally, this Court should not affirm the trial court's judgment on the alternative grounds—as the Does suggest—that Ms. Gunning has failed to make a prima facie showing of defamation. Even pursuant to the California Order, the *Crow's Nest* is not a parody because, as the court's judgment indicates, the Court

failed to hold that the *Crow's Nest* was "not likely to be taken as true by a reasonable person." (A. 109.) Indeed, that language was stricken from the Defendant's proposed Order in California, and was not included in the final order by Jude Goldsmith. (A. 110.) The First Amendment protection for parody, as delineated in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) is a subset of the truth defense. *Falwell* stands for the proposition that, in order to be parody, it must not be "reasonably understood as describing actual facts." *Id.* at 57. Something does not become constitutionally protected just because it is intended to be joke, even if it's not actually funny. It is not defamatory only if it is obviously not true. *Id.* Because this was not the case even in the California Order, this Court should not conclude that Ms. Gunning has failed to state a prima facie case.

CONCLUSION

The California Order should not be given preclusive effect because it is not final and was subject only to discretionary, interlocutory review. Thus, the trial court erred in dismissing Ms. Gunning's Complaint on the basis that it was precluded from deviating from the California court's conclusion that the Crow's Nest was parody. This Court should vacate the trial court's judgment and remand with instructions to permit Ms. Gunning to provide a limited showing of prima facie evidence within her direct control.

Respectfully Submitted by,

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